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Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 194.

HENRY CHARNOCK,
Plaintiff in Error,

vs.

THE TEXAS AND PACIFIC RAILROAD COMPANY,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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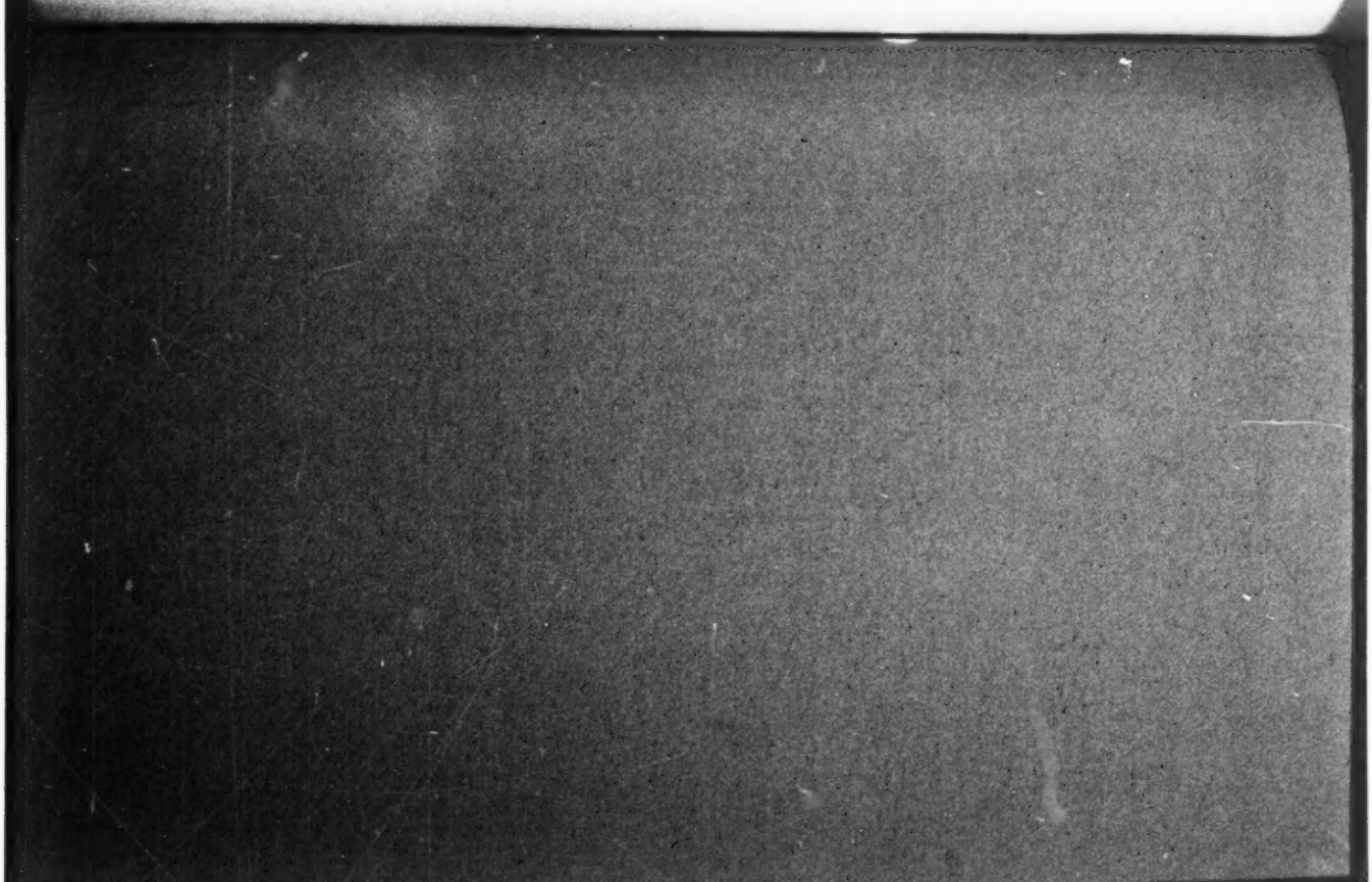

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Statement of Proceedings.

This suit was commenced in the Civil District Court for the Parish of Orleans, by Henry Charnock, the plaintiff in error, against the Texas and Pacific Railway Company, the defendant in error. Upon petition of the defendant in error, it was removed to the United States Circuit Court for the Eastern District of Louisiana. The object of the suit is to recover $2,440.32, being the alleged value of certain bales of cotton delivered to the defendant in error, as a carrier, for transportation from Meeker's Switch, a point on its line in the Parish of Rapides, La., to New Orleans.

The plaintiff in error alleges that said 52 bales of cotton were delivered to the defendant in error, on December 26, 1900, at Meeker's Switch, to be carried as aforesaid for a rate of freight then and there agreed upon, and that the said defendant in error *then and there* delivered to the agent of the plaintiff in error its bill of lading for the carriage of said cotton as aforesaid. That the said cotton, after it had been so received by the defendant in error as a common carrier, and while it was in its possession as such for transportation as aforesaid, and after the bill of lading for said cotton had been issued by the defendant in error and delivered to the plaintiff in error, with the exception of one bale thereof, was destroyed by fire while same was loaded upon the cars by defendant in error, standing upon its track at said Meeker's Switch, awaiting carriage aforesaid.

As the bill of lading in question contained a clause exempting the carrier from liability for loss or damage to said cotton by fire, the plaintiff in error endeavored to avoid the effect of this clause by alleging that same was null and void and not binding upon him for the following reasons, to-wit:

1. That he received no consideration of any character whatsoever for the inclusion of said clause in said bill of lading, and that he received no consideration of any character whatsoever sufficient to uphold said agreement restricting or limiting the liability of said Company as it exists under the common law;

2. That the stipulated freight which he agreed to pay and which the Company charged for the carriage of said cotton, was the only rate that it would give, or

was offering, or that could have been obtained by him for the carriage of the cotton from Meeker's Switch to New Orleans; and

3. That the destruction of said cotton was due to the negligence of the Company in that it left said cotton standing in two cars of the Company in the open country, unguarded and unwatched, which was a breach of its duty to take proper precaution to protect said cars and the cotton therein contained from depredation, loss or injury by third persons, wrongdoers, or those bent upon mischief (Transcript, pp. 2–4).

The defendant in error in its answer admitted that on the date above mentioned it received and undertook to transport and deliver upon the terms and conditions expressed in a certain contract or bill of lading, which was then and there entered into between it and the agent of the plaintiff in error; and admitted that the cotton was destroyed by fire while in its possession, but denied all other allegations of his petition in reference thereto. It specially pleaded the fire clause in its bill of lading and relied thereon as relieving it from responsibility for the loss of said cotton. It also denied that the plaintiff in error had any real or substantial interest in the suit, in that he had transferred all of his interest to some insurance company. This last defense, however, was abandoned on the trial (pp. 9, 10).

At the close of all the evidence introduced on behalf of either party, the plaintiff in error moved the Court to instruct the jury to find a verdict in his favor. The

defendant in error made a counter-motion requesting the Court to direct the jury to find a verdict for the defendant. After the Court had declined to direct a verdict in favor of the plaintiff, and had stated that it would direct a verdict for the defendant, the plaintiff then requested the Court to submit the case to the jury on the question, whether or not, under the evidence, the loss of said cotton by fire was due to the negligence of the defendant, but the Court refused to submit the case to the jury, not only because he thought the verdict should be for the defendant, but also because, after requesting the Court to direct a verdict in his favor, it was inconsistent for the plaintiff in error to ask the Court to submit the case to the jury. Exceptions were duly noted by the plaintiff in error to the charges, and to the refusal to charge, of the Court.

Statement of Facts.

The facts of this case may be briefly detailed as follows :

The plaintiff was the owner of the Lurenburg Plantation, situated in the Parish of Rapides, La., about two and a half miles from the line of the railway of the defendant in error. On December 26, 1900, the cotton in question was brought by a gang of laborers employed on said plantation under the direction of the manager of the plaintiff from Lurenburg Plantation to Meeker's Switch by a tramway. Meeker's Switch was not a regular station or depot of the company, but was an ordinary spur track, connected with the railway of the defendant in error, for the accommodation and use of the Meeker Plantation.

The nearest station was Le Compte, about two miles and a half west of the spur track. After the cotton was thus brought to Meeker's Switch, it was unloaded from the tramcars, and under the supervision of the manager of the plaintiff in error, it was ranged upon the ground, and from there, under his direction and control, was loaded upon two box cars of the defendant in error, which had been at his request placed upon this spur track for the purpose of receiving the cotton. After the cotton was loaded upon the cars, the manager of plaintiff closed and locked the doors of the cars. The loading was completed about 2:30 o'clock P. M., on December 26, 1900, and after which, the manager of plaintiff and his laborers went to dinner. After dinner he proceeded to Le Compte Station, and there notifying the agent of defendant that the cars were loaded and ready for transportation, received without protest or question or request for any modification of the bill of lading, from the agent at Le Compte station, the bill of lading offered in evidence, at about 5:20 o'clock P. M. The first train of the defendant in error that was due at Meeker's Switch to take this cotton was No. 70, which was due to arrive there at 9 o'clock A. M. the next morning (December 27th). At about 10 o'clock on the night of December 26th, one of the cars was discovered to be on fire, and efforts were made by the people in the neighborhood to put same out, but they were unsuccessful. From the manner in which the cars were burning it was evident that they had caught on fire from the interior (Trans., p. 26), and were burning so fiercely that only one bale of cotton could be saved therefrom.

The evidence further showed that the defendant in

error maintained no station at Meeker's Switch, nor had any agent there, nor were any of its employees located there. It had an ordinary platform and a spur track running out through the open field towards the Meeker Sugarhouse, which was situated about half a mile from the main track. It was not a regular station of the Company, and no watchmen or agents were kept there, such persons, by rule of the Company of long standing and of universal application, being kept only at regular stations. The fact that such had been the custom of the company was well known to shippers at Meeker's Switch, and was well-known to the plaintiff. This custom and usage was admitted by the plaintiff's own witness, F. G. DROUET, who testified that he had always kept his own watchman (Tr., p. 26). It was not shown by the evidence that the Company had been guilty of any delay in moving these cars, nor that any train which could have taken them had passed that point between five o'clock in the afternoon, when notice was given and the bill of lading was issued, and ten o'clock, the time that the cotton was destroyed.

The evidence does not disclose the manner in which the fire originated. Mr. F. G. DROUET, who lives about a quarter of a mile from where the cars were placed, says that about ten o'clock on the night in question, before retiring, he stepped out of his room onto the back gallery, and as he stepped out he noticed the glare of a fire about a quarter of a mile away. That he then went to one of his employees and asked him if he had had any fire in the scale house that day, and received the reply that he had not. It then occurred to him that it must be the cars

of cotton on fire, and he immediately gave the alarm and ran to where the cars were standing. On reaching there he found the first car nearest the track on fire, and one of the doors was open. His attention was then drawn to an empty box car ahead of the two cars containing the cotton, and he shoved that one out of reach in order to save it. He then unlocked and opened the door of the second car loaded with cotton, and discovered that that was also on fire in the interior. No suggestion whatever is made by any witness as to the manner in which the cars caught fire, or as to the time at which they caught on fire; and it will be noted that while the door of the first car was found open the doors of the other car, which was also on fire in the interior, were securely locked (p. 26).

Opinions of the Lower Courts.

As a matter of convenience, we insert here the opinions delivered by the trial Judge and by the Court of Appeals. The main trial of the case in the Court of first instance took place on May 13, 1901, and at the close motions were made, both on behalf of the defendant and the plaintiff, for verdicts. Judge PARLANGE took the matter under advisement and, the next morning, stated as follows:

" Both the plaintiff and the defendant have moved the court to direct the verdict. As to the condition of things thus created and the effect of such cross-motions, see Mr. Justice WHITE as the organ of the court, in Beuttell vs. Magone, 157 U. S., page 157.

" I am perfectly clear that the stipulation in the bill of lading exempting the carrier from loss by fire is valid. See Woods on Railroads, vol. 3, sec. 425; Hutchinson on Carriers, 2nd ed'n., sec. 278; Am. and Eng. Enc. Law, 2nd ed'n., *verbis* 'Carriers of Goods,'

vol. 5, page 288, *et seq.*, specially page 293; 72 N. Y., p. 90. Of course, the carrier could not have provided against his own negligence, or that of his servants, and that point is not involved in this case.

"I am equally clear that the burden of proving that the loss of the cotton was caused by the negligence of the carrier, is upon the plaintiff. See the Reeves' case, 10 Wall., p. 189, and the Downer case, 11 Wall., p. 129, leading cases of the highest authority which have laid down the rule invariably followed by the Federal courts.

"The plaintiff relies on the case of V. & A. Meyer & Co. vs. R. R., 41 La. An., p. 639. But that case was decided solely on a point entirely different from any issue in this cause. In that case, the court pointedly said (at page 642): 'The liability of the Company to the plaintiffs in the present case rests solely on their failure to ship at the proper time.'

"The defendant cites the case of R. R. vs. Wood, by the Supreme Court of Alabama, 66 Ala. Rep., page 167; also reported in 9 Am. and Eng. R. R. Cases, page 419. This was an action for the loss of freight put out by the carrier at a flag station where the carrier had no agent or other servant, the goods being stolen after they had been put off and left by the carrier. In that case the court said: 'When the consignee was informed that there was no agent of the company there (at the flag station) he was virtually told that there would be no custody of the goods by the carrier after arrival. The shipment after such knowledge was an assent on the part of the shipper to the implied condition (Wells vs. R. R., 6 Jones (N. C.), 47).' This reasoning applies with great force to the present cause.

"It is shown without dispute that Meeker station is a flag station. That a person wanting box cars there applies to the nearest station, at Lecompte, about 2½ miles from Meeker. That the shipper loads them and then goes to the agent and obtains his bill of lading, whereupon the next train passing the flag station takes the cars. The shipper well knows that the carrier has no guard or watchman at Meeker and does not expect that the carrier will guard the freight at Meeker. All of this is plainly shown by the plaintiff's own evidence and there is no dispute whatever concerning it.

"The loading of the box cars with cotton was completed about 2 p. m. The bill of lading was obtained

about 5 p. m. and the cotton was discovered to be on fire about 10 p. m. The train which was to take the cars was not due till about 9 a. m. the next morning. After loading the cars the servants of plaintiff abandoned the loaded box cars.

"At the argument of the motion to direct a verdict the only case relied upon or cited on behalf of the plaintiff was Meyer & Co. vs. R. R., *supra*, since then, Fisher vs. Brignoval, 8 N. S. (La)., 120, and other cases have been cited for plaintiff. None of them, in my opinion, present the conditions of the cause at bar.

"This is not a case where the shipper expects care and custody of his goods by the carrier. On the contrary, it is a case where he well knows that the carrier will not guard the goods, and the shipper accepting this situation, without protest, and failing himself to guard the goods, it would seem that either on the ground of assent, or the ground of having assisted in bringing about the loss, or for both of these reasons, the shipper could not recover. It is testified that there were tramps and other passersby at Meeker, such as there are on all railroads, but this evidence comes from the plaintiff's witness and as he knew of this danger—if it was a danger—the inquiry naturally arises whether the plaintiff having voluntarily submitted his goods to a danger well known to him, can recover under the circumstances of this case. Another consideration might be, whether it was not entirely unnecessary to allow the cotton to remain unprotected at the flag station from 2 P. M. to 9 A. M. the next day. It may well be that the cotton could have been loaded the next day prior to 9 A. M.

"The defendant's counsel argues with great force that even if it be held that the carrier was at fault, there is absolutely no proof that the neglect alleged was the cause of the fire. Of course, it would not be sufficient for plaintiff to show negligence in this cause, but it would be essential for him also to show the relation of cause and effect between the negligence and the loss.

"The only negligence claimed by plaintiff is the failure of the carrier to have a guard at Meeker. Of course, it is not claimed that it was the duty of the carrier to have on hand at Meeker, apparatus or other means for the extinguishment of fires. Defendant's counsel argues that there is no proof whatever, that even if the carrier had had a guard or guards at Meeker, the fire would not have happened. And this

contention seems to have great force. On careful consideration of the whole case, I am clearly of opinion that a verdict must be directed in favor of the defendant company" (pp. 31–33).

In refusing a motion by plaintiff for a new trial, Judge PARLANGE said:

"The whole argument on the motion for a new trial seemed to turn on the question whether or not the burden of proving negligence, as also a casual connection between the negligence and the damage, was on the plaintiff. I am clear that the burden of such proof was on the plaintiff. In the first place, there was no proof, in my opinion, of any negligence under the particular facts of this case. Then, even if it were held that there was proof from which the jury could have found negligence, it is very clear that there was absolutely no proof that the negligence (which, of course, could only be the failure of the railroad company to guard the cotton) was the cause of the fire. Counsel for the defendant company suggested in argument several conditions of things under which the fire could have taken place even if the defendant company had had a guard to watch over the cotton. Of course, the jury could not have been permitted to reach a conclusion by guessing.

"See the following authorities:

R. R. vs. Reeves, 10 Wall, 189.
Transportation Co. vs. Downer, 11 Wall., p. 129.
Clark *et al.* vs. Barnwell *et al.*, 12 How., 272.
Rich *et al.* vs. Lambert *et al.*, 12 How., 347.
Christie vs. The Creighton, 41 F. R., 62.
Pacific Coast S. S. Co. vs. Bancroft-Whitney Co. *et al.*, C. C. A., 94th F. R., 181.
Crowell vs. Union Oil Co.. C. C. A., 107 F. R., 302.
Hutchinson on Carriers, 2d Ed., Secs. 764 and 767.
Platt vs. Richmond, &c., R. R., 108 N. Y., 358.
Germania Fire Ins. Co. vs. M. & C. R. R. Co., 72 New York, p. 90.
Wood on Railroads, vol. 3, page 1886. (Minor's Ed. of 1894.) See. 129, U. S., 442.

As to burden of proof in Louisiana:
2 Robinson, 402.
17 Annual, 9.
24 Annual, 101.

"As to the difference between the origin of a fire which consumes a thing and the cause of the loss of the thing (see 71 Fed. Rep., 485, Thomas vs. Lancaster).

"In a suit for a negligent injury, it is not sufficient to show that the negligence and the injury co-existed, but it must be shown that the negligence caused the injury. *Post hoc ergo propter hoc* is not sound logic. Justice CAMPBELL, in Illinois Central R. R. vs. Cathy (Miss. case, 12 South. Rep., p. 253). Also C. C. A., (71 F. R., 484 and 485). There are very numerous texts and authorities on this point.

"The motion for a new trial must be overruled" (pp. 33, 34).

IN THE COURT OF APPEALS, the following opinion was delivered in affirmance of the rulings of the trial Judge:

(Before PARDEE, MCCORMICK and SHELBY, Circuit Judges).

"BY THE COURT: This was an action very similar to that of Jovite Cau against the same defendant, just decided. It was for the value of cotton delivered to the defendant carrier, which issued to the shipper a bill of lading with the fire exemption clause, identical in terms with that given in the Cau case. The cotton was received on a country or plantation switch, which the defendant had put in about the time of the construction of its main line, and which for ten or eleven years had been used by the planters conveniently adjacent thereto precisely in the manner that this shipment was made. There was a small platform and a small shelter to be used in connection with sending and receiving freight, according to its character and the other conditions at the time of handling, but no agent or employee of the Company had ever been put or kept there for the purpose of receiving and guarding freight there received or delivered. The long es-

tablished practice was for shippers who had produce to be transported from that point to notify the nearest station agent of the fact and of the number of cars desired, when the defendant would furnish the cars as requested, and, as soon as they were loaded by the shipper, promptly take them by the first one passing of its local freight trains to the point of destination. **There is no evidence that any question or protest was made by this shipper to the contract as limited in the bill of lading.**

" We concur with the trial judge in holding that the evidence does not tend to show negligence on the part of the carrier. There was no dispute as to the goods having been received by the carrier nor as to the loss falling within the terms of the fire exemption clause. If there was negligence on the part of the carrier the burden of proving that fact was on the plaintiff, and, as we have said, the proof offered by the plaintiff did not, in our opinion, tend to show such negligence. This case falls clearly within the authority of Clark *et al.* v. Barnwell *et al.* (53 U. S., 272) ; Transportation Company v. Downer (78 U. S., 129) ; York Company v. Central Railroad (70 U. S., 107).

"The judgment of the Circuit Court is affirmed" (pp. 44, 45).

ARGUMENT.

We do not deem it necessary in this brief to discuss the second and third bills of exception (3d and 4th Assignments of Error), inasmuch as the counsel for the plaintiff in error, at the close of the testimony, moved the Court to direct a verdict in his favor, and it is settled that such a motion must be based upon the fact that there is no conflict in the evidence upon any material question of fact, and precludes the party making same from thereafter requiring the case to be submitted to the jury.

Beuttell vs. Magone, 157 U. S., 154.
Angier vs. Ins. Co., 71 N. W. Rep., 761.

We think it only necessary to discuss the first bill of exception (Assignment of Error No. 2).

The motion of defendant in error to direct a verdict in its favor was based upon two grounds :

1st. That the clause in the bill of lading exempting the defendant in error for the loss of or damage to said cotton by fire, was a valid stipulation assented to by the plaintiff in error, and relieved the defendant in error of liability unless the plaintiff in error, on whom the burden was, showed that it had been guilty of negligence. That the evidence did not show that the defendant had violated any duty that it owed to the plaintiff in error, and it was not, therefore, shown that it had been guilty of negligence.

2d. That even if the defendant in error owed the plaintiff in error the duty to have placed and maintained a watchman over said cars pending transportation, and was therefore negligent in that respect in not doing so, yet, it was incumbent upon the plaintiff in error to prove that such negligence was the direct and proximate cause of his loss, which he failed to do. In other words, that the plaintiff in error must establish by proper evidence the causal connection between the negligence charged and the injury suffered.

FIRST POINT.

The fire clause in the bill of lading is a valid and binding stipulation unless negligence of the carrier be alleged and proven. The evidence adduced fails to show negligence.

As stated above in his petition, the plaintiff in error attacked the validity of the fire clause in this bill of lading upon the grounds, *first*, that no consideration of any character whatsoever had been received by him for the limitation of liability; and, *second*, specially that no reduction of rate had been or would have been given to, or could have been obtained by the plaintiff in error for the transportation of this cotton. And the learned counsel for the plaintiff in error devoted much time in the lower Courts to the accumulation of argument and authority to show that such a stipulation is invalid unless a consideration was given to the shipper therefor, or unless the shipper was permitted a fair option to ship under the common law liability or the limited liability, as he saw fit.

In answer to all this, we desire, in the first place, to call the Court's attention to the fact that there is not a scintilla of evidence in the record touching or relating to, or in the most remote manner bearing upon the question of the consideration of this contract other than gathered from the terms of the bill of lading itself. Nor is there any evidence whatsoever in the record that the plaintiff in error, or any one representing him, applied for, or even desired, the option of

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shipping under the common law liability of the carrier. Nor is there any evidence in the record that this option was not actually tendered him by the agent of the defendant in error. In fact, the record is perfectly barren on this subject.

It is hornbook law that he who pleads the nullity or invalidity of a contract on the ground of a want or failure of consideration, or fraud, or duress, must allege and prove the facts essential to establish his plea.

It is equally elementary, as well under the common as the civil law, that in commutative contracts, a sufficient consideration is presumed to have passed until the contrary be established by proof.

York Mfg. Co. vs. Ry., 3 Wallace, 107.

We shall, therefore, dismiss from consideration the question of the invalidity of this clause for want of consideration or duress.

Its reasonableness has been sustained too often by the Supreme Court of the United States to now be open to question.

R. R. Co. vs. Reeves, 10 Wallace, 176.
Transportation Co. vs. Downer, 11 Wallace, 129.

We shall, therefore proceed to the discussion of this point upon the assumption that the limitation of liability in this bill of lading was a valid and binding stipulation.

The only ground of negligence charged against the defendant in error, in reference to this cotton, was

" that the said cotton was by it left in two cars of the said Company, standing upon its track in the open country, unguarded and unwatched by the Company in any particular whatsoever; that it was the duty

of said Company to take some measures of precaution to protect said cars and the cotton contained therein from depredation, loss, or injury by third persons, wrongdoers, or those bent upon mischief; that it utterly failed and neglected to take any measures of precaution for the safety and protection of said cotton, but left it in said cars on said track, unguarded and unwatched in the night time, during which it was destroyed by fire. * * *" (Record, p. 4.)

In brief, the charge of negligence is that the defendant in error failed to have a watchman to guard said cars after loading, and while same were awaiting transportation.

Negligence is a relative term, and whether or not certain facts show negligence depends upon all the surrounding circumstances of time, place and condition. In order for the plaintiff in error to establish the negligence of the defendant in error in failing to have a watchman guard the cotton while awaiting transportation, it is essential that he should show that there was a duty imposed upon the carrier, by agreement, express or implied, to maintain such a watchman. It is not pretended that there was an express agreement to that effect; so that if any duty rested upon it to do so, it was implied from the nature of its calling, or from the surrounding condition of affairs. While it is true that, generally speaking, the duty rests upon the carrier to safely transport and deliver goods tendered to it for carriage, yet this duty is not absolute or without limitation or qualification. What constitutes safe delivery; what constitutes proper care, depends upon custom, and depends upon the surrounding circumstances of each case. Formerly the undertaking of a carrier for the transportation of goods to a given destination embraced a personal delivery to the

consignee or his authorized agent. Now, universal custom has settled it as being the more reasonable rule in regard to railroads that a personal delivery to the consignee is not required. Their routes are in a measure fixed, and cannot be varied to suit the convenience or accommodation of a particular shipper. It is manifest that they cannot, in the proper performance of their duties to the public, undertake to have, except at regular and proper intervals, stations where they maintain agents, stop their trains and transact their business. To require otherwise would be to burden the carrier with much useless expense and cause useless delays, and in the end make the expense of and delay in transportation of freight burdensome to the shipper.

If, therefore, as in the present case, for the accommodation of some particular shipper or shippers, the carrier agrees to receive or deliver freight at a place other than a regular station, it has the perfect right to do so under such conditions, not oppressive or unreasonable, as it may see fit to establish. It might, for instance, require such a shipper himself to load his freight in the cars ; or might refuse to transport it except on certain trains ; or might require him to be present personally, or by authorized agent, to receive it from or deliver it to the carrier ; or might require the shipper to assume the risk of theft or damage pending its actual receipt for transportation while deposited at or near the company's railroad. Such conditions, moreover, can be established as well by custom as by positive agreement, with this limitation : that such conditions if created by custom, to be binding upon the shipper, must be understood by him to exist, or knowledge thereof must be so

general as to charge him with knowledge of the existence thereof.

If, with full knowledge, actual or implied, of the conditions under which the carrier receive or delivers freight at such a place, one assumes to deal with it, there is an implied acquiescence or agreement on his part to such conditions. Thus, if a shipper knew, or the circumstances were such that he is held to have known, that at a certain place on the carrier's route, where there was no agent or employee of the company to receive same, goods delivered were customarily deposited on a platform, and that it was incumbent on the consignee to see to their care thereafter, it could not be charged that the carrier in so acting had violated any duty it owed him should the goods be subsequently lost. There is an implied agreement on his part with the carrier that it should so deliver, and in doing so, it would have performed its full duty towards him.

A case in point is *R. R. Co. vs. Wood, 66 Ala., 167 (9 Am. & Eng. R. R. Cases, 419).* In that case, Wood sued the carrier for loss of 74 bushels of corn shipped by him to one Moss at Jemison Station on the line of the defendant company, and which he alleged the carrier failed to deliver. The station in question was a flag station where no agent was maintained, so the car was placed on the side track there, and some of the corn was lost. The Court, speaking through Mr. Justice SOMERVILLE, said:

"In the present case, as shown by the evidence, it was distinctly understood at the time of the shipment of the corn in controversy that the South & North Alabama Railroad Co. had no agent at Jemison Station, which was a mere flag station, to which the car-

load of corn was consigned. It was equally well made known that there was neither agent nor station at Smith's Mills, where it was agreed that the corn must be delivered. The question presented for our decision is: Did the safe delivery of the car containing the corn on the side track at the station where it was agreed to be received, terminate the liability of the Railroad Company as a common carrier?

"The law does not require of railroad companies the absolute duty to construct or keep warehouses at every station along their route of travel or transportation. They are required only to do the best their means will enable them to do under existing circumstances, and must act in accordance with the reasonable necessities of their usual business (Redfield on Carriers, Sec. 120). We can see no reason why a railway company acting as a common carrier cannot stipulate by a contract, express or implied, that their liability as a carrier shall terminate with the delivery at a particular point, and that they assume no liability at all in such cases as warehousemen.

"If the consignee is fully advised at the time of shipment that the Company has no agent at the particular station or place to which the consignment is made, and the failure to employ such agent is not shown to be unreasonable in view of the condition of the company's business, there is, in the absence of rebutting circumstances, an implied consent that the carrier's responsibility shall be dissolved when he has done all that the nature of the case permits him to do according to the reasonable and proper usages of his business.

"The delivery of the carload of corn on the side track at Smith's Mills terminated the liability of appellant. It would be unreasonable to require the Railroad Company to employ a special agent to keep the corn in further custody, unless there was agreement, express or implied, to do so. When the consignee was informed that there was no agent of the Company there, he was virtually told that there would be no custody of the goods by the carrier after arrival. The shipment after such knowledge was an assent on the part of the shipper to the implied conditions. Wells vs. Wilmington R. R. Co., 6 Jones (N. Car.), 47."

This we believe to be a correct exposition of the law of the instant case and decisive of the issue in favor of the defendant in error.

In the instant case, Meeker's Switch was a mere spur track jutting out from the main track of the Company, running through an open plantation field to a sugar house about a half of a mile distant from the main track. There was no station-house at this place. The trains of the Company did not stop there, except upon notice that loaded cars were awaiting transportation there. No watchman or other employee was maintained at that place. The shippers loaded their own freight in the cars, which were left there only when requested.

In fact, the evidence shows that the Railroad Company did not exercise, and had never exercised the slightest control over the reception of freight at that point, leaving it entirely to the shipper to load the cars at such time as he saw fit, and to take such precautions as he saw fit in regard to the custody or care of same after loading until same were taken away by a train of the Company. This custom of the Company had been in existence ever since Mr. PAUL, the witness for the defendant, had been Division Superintendent, some eleven years. That it was well known to and understood by all people shipping at that place is evidenced by the testimony of Mr. DROUET (Tr., p. 29), the Manager of the Meeker Plantation, on which this spur track was situated :

Q. Had it been the custom of the Texas & Pacific Ry. Co. to have a watchman down there to watch the cars?

A. No, sir; we had our own watchman at our sugarhouse.

Q. It was generally known to all that the Railroad Company had no watchman down there?

A. Yes, sir.

Q. But there is no station agent there?

A. No, sir.

Q. There has never been one there?

A. No, sir.

Again on page 31:

By Mr. Miller:

Q. Did the Railroad Company maintain a station at Meeker's Switch?

A. It is a flag station, but they put the mail off there.

Q. Has the Railroad an agent there?

A. No, sir.

Q. There is nobody there in charge of it at all?

A. No, sir.

Q. Meeker's Switch is what—an open field or what?

A. It is right in the open field, on our plantation, that comes in from the main line of the Texas & Pacific Railroad.

Q. It is not protected or enclosed in any way? It is just in the open country?

A. Yes, sir.

By Mr. Spencer:

Q. In other words, it is just like any other spur track in the country; running from the main line out to some sugarhouse in a field?

A. Yes, sir.

We think it, therefore, clear under the facts as disclosed by this record that the plaintiff delivered these two cars to the defendant on this switch with full knowledge of the fact that the defendant in error would not undertake to guard or protect them in any way whatsoever, and there arose from his knowledge of these facts an implied agreement on his part that, if the Company accepted delivery of these cars at this flag

station, they should not be required to place and keep a guard over them, and he cannot now complain that their failure to do so was a breach of any duty owing to him, and if there was any reason to believe that the cotton was liable to be injured or destroyed by third persons or evildoers of any kind, the plaintiff could more readily have had same protected by his own watchman than could the Railroad Company. We hardly think it a fair argument to charge that the Railroad Company failed to exercise due care in leaving this cotton unguarded in an open field, if we assume that the plaintiff himself was a prudent man, who, knowing that the Railway Company would not, and had never been in the habit of guarding cotton, should leave it in such a condition unprotected.

There is nothing unreasonable in the custom of the company in this respect, so far as these spur tracks are concerned. On the contrary, we think it would be extremely unreasonable, as it would be extremely burdensome to the defendant in error, if it were required to place and maintain a watchman at every spur track along its sixteen hundred miles of road, to guard cars, which, for the convenience of some special shipper, were placed thereon,

The learned Judge *a quo*, in expressing his views in passing upon the motion of the defendant to direct a verdict, said:

"This is not a case where a shipper expects care and custody of his goods by the carrier. On the contrary, it is a case where he well knows that the carrier will not guard the goods, and the shipper, accepting

the situation without protest and failing himself to guard the goods, it would seem that either on the ground of assent or the ground of having assisted in bringing about the loss, or for both of these reasons, the shipper could not recover. It is testified that there were tramps and other passers-by at Meeker, such as there are on all railroads, but this evidence comes from the plaintiff's witness; and as he knew of this danger, if it was a danger, the inquiry naturally arises: whether the plaintiff, having voluntarily submitted his goods to a danger well known to him, can recover under the circumstances of this case?" *(ante,* p. 9).

We submit that the case of *Fischer vs. Brig Norvall, 8 Martin (N. S.), 120,* so confidently relied upon by the plaintiff in error on this question, is not applicable to the facts of this case; for, while it might be true that to leave cotton uncovered and exposed over night on the public wharves of the City of New Orleans without guards or protection of any kind, might be the grossest negligence, it would be perfectly consistent with prudence to leave cotton stored and locked and sealed in a box car on a plantation sidetrack; and if the plaintiff and his employees can be considered prudent men, they set an example which the defendant in error had a right to follow.

We, therefore, submit that the plaintiff in error failed to sustain the burden of proof which was upon him to show the negligence of the defendant.

SECOND POINT.

Even though the defendant in error owed the plaintiff in error the duty to have placed and maintained a watchman over said cars pending transportation, and was therefore negligent in that respect in not so doing (which we deny), yet it was incumbent upon the plaintiff to prove that such negligence was the direct and proximate cause of his loss, which he failed to do.

If, for the sake of argument, we admit that there was negligence on the part of the Company in not maintaining a watchman to guard said cars pending the arrival of the train which was to carry them into New Orleans, this fact standing alone would not be sufficient to justify a verdict against the defendant in error, for it is perfectly well settled that, in a suit for a negligent injury, it is not sufficient to show that negligence and injury co-existed, but it must be shown that the negligence caused the injury. In other words, there must be a causal connection between the negligence and the injury.

In *Railroad Company vs. Cathy, 12 Southern Rep., 253*, Chief-Justice CAMPBELL said :

" It is not enough that the negligence of the employer and injury to the employee co-existed, but the injury must have been caused by the negligence, and the fact that injury to an employee occurred after the negligence, is not sufficient to show the relation of cause and effect between them. *Post hoc ergo propter hoc* is not sound as evidence or argument. Nor is it sufficient for a plaintiff seeking recovery for alleged negligence by an employer towards an employee to show a possibility that the injury complained of was

caused by negligence. Possibilities will not sustain a verdict. It must have a better foundation. * * * The evidence of the plaintiff is wholly insufficient to establish any necessary or even probable connection between the negligence of the defendant, testified to by the witness for the plaintiff, and the hurt of Cathy. He may have suffered his injury as the result of the thing spoken of, but no man can say that he did, or that it is probable that he did. His business was a perilous one, in which the most experienced and cautious are liable, under the most favorable conditions, to suffer injury and meet death, which lurks in a thousand forms and claims its victims when least expected oftentimes. It is just as probable from the evidence that Cathy fell from some one of the many causes that might have caused it, as that he stumbled over coal, or uneven rails, or from his pants being caught by a piece of the rail which was said to project from it at right angles, which latter is said by counsel to have been the most probable cause of his fall. It is all pure guessing—the merest conjecture as to how the accident was produced, and the evidence for the plaintiff fails to do more than to suggest several ways in which it might have occurred. But what caused it is unknown, except as indicated by what the unfortunate man said; that is, that he fell down between the cars and the wheels passed over him. * * * But, we have considered the case as if all was proved which the plaintiff's evidence, accepted as true, tends to prove, and thus viewed, there is a wide chasm between the matters referred to as the cause of the hurt and the injury received. This chasm has no bridge but conjecture, which is insufficient to maintain a jury in crossing to a verdict in any case. It must, therefore, have been leaped by the jury, moved by sympathy for the dead son and the living, sorrowing father, and excited by the eloquence of counsel dealing with so pathetic a theme."

In the case of *Marande vs. Texas & Pacific Ry. Co., 42 C. C. A., 317*, where the destruction of the cotton sued for was claimed to have been caused by the negligence of the defendant in that it did not maintain a sufficient number of watchmen to properly guard

same; in that it permitted a locomotive to come in close proximity to the cotton; and in that proper care was not exercised in the extinguishment of the fire after discovery—the Court said:

"As the second ground of recovery, the case as to the first issue hardly merits discussion. That there were evil disposed persons in the vicinity who might have set fire to the cotton, and that the defendant, by keeping a large force of watchmen at its wharf, might have more efficiently protected its property from risks, are facts that may be assumed to be proved by the evidence. But the facts did not prove, nor tend to prove, that the fire actually was the work of an incendiary, and there was not a scintilla of evidence to prove this. On the other hand, the place where it was shown that the fire started raised a persuasive inference against the theory of an incendiary origin, because it started at the most unlikely and dangerous place for the operation of an incendiary. There was not a particle of evidence to connect the locomotive with the fire. If the fire had started in the cotton which was stored in the vicinity of the locomotive, there would have been one fact of value, but it did not. It does not appear that the locomotive emitted any sparks or dropped any coals. No fact was elicited to prove that the locomotive engendered risk beyond its mere presence, and seven or eight hours had elapsed after the locomotive was taken away. The case for the plaintiffs as to the negligent origin of the fire rested wholly upon conjecture and speculation."

The following authorities are to the same effect:

R. R. Co. vs. Reeves, 10 Wallace, 189.
Transportation Co. vs. Downer, 11 Wallace, 129.
Clark vs. Barnwell, 12 How., 272.
Rich vs. Lambert, 12 How., 347.
Platt vs. R.R., 108 N. Y., 358.
Steamship Co. vs. Bankrupt, 94 Fed., 484.
Thomas vs. Lancaster Mills, 71 Fed., 481 at 484.

We refer to two other illustrative cases, one in the Court of Appeals in New York and the other in the Supreme Court of the United States, showing the application of the principle in support of the proposition for which we are contending. The first is the celebrated case of Laidlaw vs. Sage (158 N. Y., 76), in which the plaintiff claimed that, although the defendant was not responsible to him for the consequences of an explosion caused by a third party in the defendant's office, yet he was entitled to recover for the injuries which he sustained by reason of his being unlawfully moved from one position in the office to another by the defendant. The testimony in the case showed that the explosion of a quantity of dynamite had entirely wrecked all parts of the office, a large room 30 by 26 feet, and injured persons in different parts of the office. The contention of the defendant was that to send the case to the jury upon the question of whether the plaintiff was injured more in a particular spot than he would have been 18 or 20 inches to the right or left of that spot was to give the jury nothing but the merest conjecture, guess or speculation. On the part of the plaintiff it was claimed that there was some testimony as to the lines of explosion, the fractures of the beams or joists in the floor of the office, and some matters of that sort which would entitle the jury to find that the plaintiff would have been less hurt if allowed to remain at the place where he was standing before it is claimed the defendant moved him, than he was hurt at the place to which the defendant moved him; and upon the submission of the evidence to the jury, the jury rendered a verdict of $40,000 in favor of the

plaintiff. Upon this point, after citing a large number of authorities, at page 97, the Court says:

"Thus we see that this court has, in a long line of decisions uniformly held that to justify a submission to the jury of any issue, there must be sufficient proof to sustain the claim of the party upon whom the onus rests, and that mere conjecture, surmise, speculation, bare possibility, or a mere scintilla of evidence, is not enough. When the principle of these cases is applied, it becomes obvious that the court was not justified in submitting to the jury the question whether the plaintiff suffered any substantial damages by reason of his having been moved in the manner claimed, even though it should find the defendant moved him. No one can read the evidence in the record as to the nature, power and effect of the explosion, and the results that followed, without reaching the conclusion that it utterly failed to show that the plaintiff was more seriously injured than he would have been if he had remained where he claims to have first stood. Indeed, we can find no proof sufficient to justify the conclusion that there was any place of safety, or comparative safety, in any of the rooms occupied by the defendant. The explosion swept with terrific force over them all, destroying or seriously injuring every person or thing with which it came in contact. Under such circumstances to permit a jury to guess or conjecture that the plaintiff's injuries were more serious or severe than they would have been if his position had not been changed, is, in the language of JUDGE GRAY, 'to withdraw from the litigant a safeguard intended for the protection of his rights.' We think the court erred in not directing a verdict for the defendant, at least so far as substantial damages were concerned, upon the ground that there was no sufficient proof that the plaintiff sustained any injury in consequence of the alleged conduct of the defendant."

The other illustrative case to which we refer is Patton vs. The Texas & Pacific Railway Co. (179 U. S., 663), in which the unanimous opinion of this Court was delivered by Justice BREWER. From that opinion we make the following extract:

"Upon these facts we make these observations: First. That while in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which in the absence of some explanation or proof to the contrary is sufficient to sustain a verdict against him, for there is *prima facie* a breach of his contract to carry safely, *Stokes v. Saltonstall*, 13 Pet., 181; *Railroad Company v. Pollard*, 22 Wall., 341; *Gleeson v. Virginia Midland Railroad*, 140 U. S., 435, 443, a different rule obtains as to an employee. The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employe to establish that the employer has been guilty of negligence (*Texas & Pacific Railway v. Barrett*, 166 U. S., 617). Second. That in the latter case it is not sufficient for the employe to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employe is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs. Third. That while the employer is bound to provide a safe place and safe machinery in which and with which the emoloye is to work, and while this is a positive duty resting upon him and one which he may not avoid by turning it over to some employe, it is also true that there is no guaranty by the employer that the place and machinery shall be absolutely safe."

Has the plaintiff in error established the casual connection between the alleged negligence, viz.: the absence of a watchman, and the injury, viz.: the destruction of the cotton? Clearly not.

The origin of the fire is shrouded in mystery. When, how, or by whom it was set is unknown and unexplained. Whether it had been burning for hours prior to its discovery at ten o'clock by MR. DROUET, or had just caught when seen by him; whether it had been smouldering unseen and undiscoverable for hours before, or whether it burst into a furious blaze at the moment when he saw it, is unexplained. Whether it was set by some of the plaintiff's own laborers while loading the car in the afternoon; or whether the car was burst open by one, or a dozen, or a hundred evilly-disposed persons and set on fire, is unsettled. Whether the persons setting fire to same were so numerous or determined that it would have required one or a dozen watchmen to protect the property, is unknown. Whether the fire in its incipiency was so small and so readily discoverable that a single watchman present, without special appliances, could have arrested its progress, or whether the cotton burst into flames with such fury, or caught in such a manner as not to be readily discoverable until it had passed control, are matters not cleared up by the evidence. So far as the evidence discloses, this cotton might have been set on fire by some of the plaintiff's employees while loading same in the cars, and it might have smouldered along in this closed and sealed car without anyone having been able to discover its presence until the whole car burst into flames. Or, again, it may have burned so fiercely from the very start that a dozen of men could not have put it out, even had they been present on the scene when it first caught. The plaintiff has left it entirely to conjecture as to how this fire originated; as to whether in the exercise of proper care the defendant in error could have discov-

ered it, even though it had a watchman present; or having discovered it, could have extinguished it by the exercise of proper diligence. To have submitted this case to the jury under the evidence adduced, would have been to authorize them to have a guessing contest as to whether or not the absence of this watchman had anything to do with the destruction of the cotton. It seems to us rather a persuasive and pertinent fact, indicating that the fire was set while the cars were being loaded, that one of the cars, though locked and sealed, was on fire in the interior. This fact points more strongly to the negligence of the plaintiff's employees in loading than it does to the negligence of the defendant in error.

We, therefore, submit that the plaintiff has failed to show that the absence of a watchman was the cause of the destruction of his cotton, and, in conclusion, we submit that the Circuit Court properly directed a verdict to be entered for the defendant on the record so made up, and the Circuit Court of Appeals properly affirmed its action.

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Supreme Court of the United States.

No. 194.

HENRY CHARNOCK

vs.

THE TEXAS & PACIFIC RAILWAY CO.

SUPPLEMENTAL BRIEF FOR DEFENDANT.

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Supreme Court of the United States.

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SUPPLEMENTAL BRIEF FOR DEFENDANT.

I.

We recall attention to the decision rendered by Mr. Justice White in Beuttell vs. Magone, 157 U. S. 154, 157, and its effect on this case. As pointed out by the learned trial Judge, transcript, p. 31, both parties having asked the court to direct a verdict, their action was a request that the court find the facts, and they are therefore concluded by the finding made by the court upon which the resulting instruction of law was given. The facts having been thus submitted to the trial court, the appellate tribunal is limited in reviewing its action to a consideration of the correctness of the finding on the law, and must affirm if such finding be supported by any evidence, the conditions being similar to those in Lehnen vs. Dickson, 148 U. S. 71, and

Runkle vs. Burnham, 153 U. S. 216. This rule would seem to control the case in our favor. The facts stated by the trial Judge fully support his ruling.

II.

In this case it might be useful for the Court to notice the methods of business in Louisiana and Texas in the matter of spur tracks or switches leading to factories, sugar houses and cotton gins and warehouses. They are very numerous, and it may be stated that on the line of the Texas & Pacific Railway Company they number not less than twelve hundred. They are not required by any common law rule, but are for the convenience of the shipping public, and represent the important economies of modern transportation. Cars are set out at shipper's request on these spurs and loaded by the shipper. The shipper then goes to the nearest railway station and obtains a bill of lading. In the instant case the plaintiff pursued this course, pp. 21, 27. He loaded his cotton on the two cars standing in the open field, p. 28. The spur, known as Meeker's Switch, had been there a long time. It was generally known that there were no watchmen on the spur, p. 26, and no agent; and the rule in this respect as to this and the other spurs was of long standing and universal application, p. 30.

It is not even claimed that the Railway Company could keep fire apparatus at such a place, p. 33. Shipments from plantation spurs are irregular and infrequent, and it would be a great extravagance to maintain watchmen on such spurs, and such unnecessary expense would in the last result fall on the public. The fact that such spurs have existed and have been operated for years without watchmen, and in such method, has been

well-known to shippers, and their assent is implied. There was no law requiring the Railway Company to furnish such conveniences, and when furnished it is but just that they should be used by shippers on the conditions upon which they are supplied.

III.

The authorities cited by the plaintiff cannot prevail against the well-settled jurisprudence of this Court as well as of the Supreme Court of Louisiana. We have a right to rely on such decisions in this Court as N. J. Steam Nav. Co. vs. Bank, 6 How. 384; Clark vs. Barnwell, 12 How. 272; Railroad vs. Reeves, 10 Wallace, 176; Transportation Co. vs. Downer, 11 Wallace, 129; and the other federal cases found in the opinions of the Courts below. As for the Supreme Court of Louisiana it has adhered to the same rule and relied upon the same authorities.

Price vs. Uriel, 10 La. An. 413.

Thomas vs. Morning Glory, 13 *Id.* 269.

N. O. Ins. Co. vs. R. R. Co., 20 *Id.* 303.

In Thomas vs. Morning Glory, the Court followed the above case from 6th Howard, 384; and noted that Mr. Justice Campbell, then of the Supreme Court of the United States, had laid down the same rule at Circuit in New Orleans. And the Court applied to a person accepting a bill of lading, with an exception, the sensible rule that "in whatever manner a man has bound himself he shall remain bound," p. 270.

In the instant case the plaintiff loaded his cotton and then applied for and accepted a bill of lading containing the following clause:

"9. That the acceptance of the bill of lading shall be deemed conclusive proof of the assent of the owner of said cotton to all the terms and conditions written or printed thereon."

We also refer to the interesting case of Washburn-Crosby Company vs. R. R. Co., 180 Mass. 252.

Respectfully submitted,

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